Office-Supreme Court, U.S.
FILED
MAR 12 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 46

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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March 12, 1964

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Petitioners, the People of the State of California and the Public Utilities Commission of the State of California, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled *Lo-Vaca Gathering Company, et al. v. Federal Power Commission*, No. 19478, on September 24, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, pp. 1-15) is reported at 323 F.2d 190 (5th Cir. 1963). The opinion

and order of the Federal Power Commission (R. 254-77) are reported at 26 FPC 606 (1961), and the Federal Power Commission's order denying rehearing (R. 332-34) is reported at 26 FPC 840 (1961). The decision of the Presiding Examiner (R. 204-37) is reported at 26 FPC 617 (1961).

JURISDICTION

The judgment of the Court of Appeals reversing the Federal Power Commission's orders was entered on September 24, 1963. (App. B., *infra*, p. 16). The order of the court denying petitions for rehearing was issued December 17, 1963. (App. C, *infra*, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 19(b) of the Natural Gas Act, 15 U.S.C. Sec. 717r(b).

QUESTION PRESENTED

The question is whether an interstate stream of natural gas, destined for interstate markets and subject to the regulatory authority of the Federal Power Commission, may be contractually segregated so as to make a portion of that stream appear to be nonjurisdictional, and by this fiction remove such portion from said regulatory authority.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended 15 U.S.C. Sections 717-717w, are set out in Appendix D, *infra*, pp. 19-25.

STATEMENT

A. Proceedings Before the Federal Power Commission.

On March 15, 1960, El Paso Natural Gas Company (El Paso) one of the nation's largest interstate pipeline companies, and the principal supplier of natural gas to the California market, contracted with Lo-Vaca Gathering Company (Lo-Vaca) for the purchase of a supply of natural gas from the Gulf Coast area of

the State of Texas. (R. 129-53). The contract purports to restrict El Paso to utilize the gas "solely as a fuel in El Paso's compressors, treating plants, boilers, camps and facilities located outside the State of Texas." (R. 149). The contract provides for an initial price of 22 cents per Mcf. (R. 141-42).

On July 19, 1960, El Paso contracted with Houston Pipe Line Company (Houston) to purchase gas also produced in the State of Texas. (R. 75-112). This contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas." (R. 78) Under a cost-of-service formula, the contract calls for an initial price of approximately 19.5 cents per Mcf. (R. 94-95).

Pursuant to Section 7 of the Natural Gas Act[1], Lo-Vaca, on June 1, 1960, applied to the Federal Power Commission (Commission) for a certificate of public convenience and necessity to gather and deliver its natural gas to El Paso. (R. 121-79). Lo-Vaca claimed the sale itself was nonjurisdictional.[2] On December 27, 1960, Houston filed a petition for a declaratory order under Section 16 of the Act[3] for the purpose of removing uncertainty as to the jurisdiction of the Commission over its sale to El Paso. (R. 179-96).

The Commission consolidated Lo-Vaca's application and Houston's petition for the limited purpose of resolving the questions of jurisdiction. (R. 201-3).

Hearings were conducted before a presiding examiner on March 21-22, 1961, and April 10, 1961. (R. 19-71). The People of the State of California and the Public Utilities Commission

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1. 52 Stat. 824, 15 U.S.C. Sec. 717f (App. D., pp. 21-24)

2. Lo-Vaca's application covers two contracts. The second contract, dated May 16, 1960, is conceded to be a sale in interstate commerce for resale, and is not involved in this review.

3. 52 Stat. 830, 15 U.S.C. Sec. 717o (App. D., pp. 24-25).

of the State of California (California), petitioners herein, intervened. (R. 197-200). Also intervening were El Paso and Transwestern Pipe Line Company (Transwestern), and Southern California Gas Company and Southern Counties Gas Company of California, and Pacific Gas and Electric Company. Transwestern, like El Paso, is an interstate pipeline company; the other companies are local natural gas distributing companies serving residential and industrial consumers within the State of California.

B. The Presiding Examiner's Decision.

The initial decision of the presiding examiner was issued on August 11, 1961. (R. 204-37). The examiner found (1) that the Lo-Vaca sale to El Paso would be a sale for resale in interstate commerce and subject to the Commission's jurisdiction even though the contract provided that the gas would not be resold by El Paso when transported outside the State of Texas, and (2) that the Houston sale would not be a sale for resale in interstate commerce subject to the Commission's jurisdiction even though the Houston gas would be commingled with other gas admittedly moving in interstate commerce for resale.

Lo-Vaca's position before the Commission was that its sale, conceded to be in interstate commerce, was a "direct" sale to El Paso and was not a sale for resale within the meaning of Section 1(b) of the Natural Gas Act.[4] (R. 211). Houston argued that under its contract gas would be consumed entirely within the State of Texas and thus, even if resold by El Paso, the sale would not be one for resale in interstate commerce. (R. 211-12). El Paso supported the positions of Lo-Vaca and Houston.

The examiner found, as the parties agreed, that the Lo-Vaca and Houston gas would be physically commingled in El Paso's interstate transmission system, and that some part of the gas "inevitably would be *physically* transported in interstate com-

4. 52 Stat. 821, 15 U.S.C. Sec. 717(b) (App. D., p. 19).

merce for resale in interstate commerce by El Paso for ultimate consumption in California * * *". (R. 210-11). The only "segregation" of the gas, the examiner found, was by contract language. The contracts provided not for the physical separation of the gas from other gas in the stream, but only for the metering of the gas at the points of entry into the commingled interstate stream and the taking out of at least the amounts so metered at specific plants in the State of Texas or at any El Paso facility outside Texas. (R. 219-21).

In Lo-Vaca's case the examiner concluded that, in view of the commingling, some or all of Lo-Vaca's gas would be in fact resold and that, this being so, Lo-Vaca and El Paso could not remove themselves from the Commission's jurisdiction by the contractural artifice that El Paso always consume in its facilities outside the State of Texas an amount of gas at least equal to that purchased from Lo-Vaca. The examiner found Commission jurisdiction over the Lo-Vaca sale to El Paso.

In Houston's case the examiner concluded that the gas was produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas. Because the gas was not commingled with any gas from outside the state, but moved with Texas produced gas only, no interstate commerce was involved. (R. 224-26). Consequently, the examiner ruled against Commission jurisdiction in the Houston instance.

California, among others, filed exceptions to the examiner's decision. California's exceptions were directed to the examiner's failure to find that the Houston sale was also subject to the Commission's jurisdiction. (R. 238-53).

C. The Commission's Opinion.

On October 23, 1961, the Commission issued its Opinion No. 348 (R. 254-77) reversing that part of the examiner's initial decision pertaining to the Houston sale, and finding jurisdiction over Houston as well as Lo-Vaca.

The Commission stated the question presented as "whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system." (R. 262). In answering this question in the negative, the Commission found that the Lo-Vaca and Houston gas would actually in part be resold to customers outside the State of Texas inasmuch as the record showed it was physically impossible to restrict the use of this gas to certain facilities as was the intention of the contracting parties. The Commission held both sales to be sales in interstate commerce for resale within the meaning of Section 1(b) of the Natural Gas Act.[5]

The Commission first considered the reality of the commerce involved:

> "It is the 'nature of the beast' not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract." (R. 266).

The facts, as viewed by the Commission, demonstrated that the character of the Lo-Vaca and Houston sales was indeed essentially interstate commerce:

> "El Paso is engaged in an enterprise extending from Texas to California and from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by

5. 52 Stat. 821, 15 U.S.C. Sec. 717(b) (App. D., p. 19).

which fuel could reach its Texas compressor stations, for the Houston gas commingled with other gas in El Paso's main line would physically move out of Texas although some portion might travel through the proposed 16-inch line.

"The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states." (R. 267-68).

The Commission concluded that a sale of gas to El Paso's interstate system, to be used for system purposes and in part to be sold for resale outside the State of Texas, was within its jurisdictional authority. The Commission added: "The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by terms of the contracts but actually would become system gas along with gas of other producers who did not receive this contractual treatment." (R. 268).

The Commission relied primarily upon *Oklahoma Natural Gas Co.*, 23 FPC 291 (1960). There the Commission decided that it had jurisdiction over a delivery of gas by one interstate pipeline company to another interstate pipeline company pursuant to an exchange agreement under which each would receive gas from the other at points within the State of Oklahoma and an equivalent amount of the gas exchanged would be consumed within the state. The Commission, in that case, found that the gas sold actually would be transported outside Oklahoma for resale. Accordingly, in the instant case, the Commission held "that a sale of gas in interstate commerce for resale cannot be transmuted into something else by contractual provisions." (R. 272).

The Commission's Opinion also reviewed numerous court decisions concerned with the issue of what sales are sales for resale in interstate commerce and subject to regulation. (R. 264-71). The Commission refused to be governed by *City of Hastings v. Fed-*

eral Power Commission, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 348 U.S. 820 (1955), and *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), because such cases involved direct sales of gas or electric energy for ultimate consumption in the state of sale for local purposes. The instant case, by contrast, involves sales to a pipeline system to enable the pipeline company to carry on its interstate business. (R. 271). The Commission also found that *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), where the commingled interstate stream contained only the gas of a single seller, was distinguishable from the instant case where the interstate pipeline is to be filled with gas from sources other than Lo-Vaca and Houston.

The Commission further found that regulatory considerations demanded the exercise of its jurisdiction:

> "It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be resold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a competitive disadvantage in obtaining additional supplies of gas." (R. 269).

One Commissioner dissented in part from the decision of the majority. (R. 274-77).

Applications for rehearing were filed by Lo-Vaca (R. 317-31), Houston (R. 277-88) and El Paso (R. 289-316). Said applications were denied by the Commission by order of December 12, 1961. (R. 332-34).

D. Proceeding in the Court of Appeals.

On February 6, 1962, Lo-Vaca, Houston and El Paso filed in the United States Court of Appeals for the Fifth Circuit a joint petition to review the Commission's decision. (R. 1-18). California and Southern California Gas Company and Southern

Counties Gas Company of California (Southern Companies) were granted leave to intervene in support of the Commission in the court proceeding. Oral argument was heard by the court on January 7, 1963.

1. The Majority Opinion.

On September 24, 1963 the court issued its decision which vacated the order of the Commission under review. (App. A, pp. 1-15, 323 F.2d 190). The Court relied upon *United States v. Public Utilities Commission*, 345 U.S. 295, 318 (1953), wherein this Court, in considering whether a distinction for jurisdictional purposes could be made between electric energy sold in interstate commerce to the United States Navy for its own use and electricity sold to the Navy for resale, stated that such separability would turn on whether "an essentially separate transaction covering the power directly consumed by the purchaser is identifiable". The Fifth Circuit found that Lo-Vaca, Houston and El Paso "carefully tailored their transactions to fit the above *caveat*". (App. A, p. 5, 323 F.2d at 192).

The majority of the court, in vacating the Commission's decision, relied also on *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), cert. denied 349 U.S. 420 (1955), and *North Dakota v. Federal Power Commission*, 247 F.2d 178 (8th Cir. 1957). The *City of Hastings* case, the court held, stands for the proposition that a direct sale of natural gas to a city for plant fuel, even if commingled with gas also sold to the city for resale, is nonjurisdictional if the sale was covered by separate rate and contract. (App. A, pp. 5-6, 323 F.2d at 192-193). The *North Dakota* case, the court stated, affirmed a finding of nonjurisdiction over gas produced and consumed in the State of North Dakota but commingled for transmission purposes with gas moving in interstate commerce. (App. A, pp. 6-8, 323 F.2d at 193).

The Commission's decision, the court continued, "ignores the nature of natural gas." (App. A., p. 8, 323 F.2d at 194). The court explained:

> "Must petitioners [La Vaca, Houston and El Paso] be driven to the unnecessary expense of constructing a parallel line to carry the 'non-jurisdictional' gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation." (App. A, p. 8, 323 F.2d at 194, fn 6).

In concluding, the court considered the argument advanced by the California intervenors that the Commission must have complete price jurisdiction over gas that inevitably is sold for resale in interstate commerce. The Court said that such a plea must be made to Congress and not to the judiciary. (App. A, p. 9, 323 F.2d at 194).

2. The Dissenting Opinion.

In the dissenting opinion Circuit Judge Rives urged that jurisdiction should not turn on contract clauses "that do not correspond and are not intended to correspond to reality." (App. A, p. 14, 323 F.2d at 197). Whether gas is transported in interstate commerce or sold in interstate commerce for resale depends, according to the dissenting opinion, "not on what the parties say about the transaction but on what is done with the gas." (App. A., p. 14, 323 F.2d at 197).

In Judge Rives' view, the three cases relied on by the majority[6] do not permit a finding of nonjurisdiction solely on the basis of contractual language. Relying instead on this Court's opinion

6 See pages 9-10, *supra*

in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 529 (1945), the dissenting opinion stated: " 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.' " (App. A, p. 14, 323 F.2d at 197). Likewise, federal jurisdiction follows the flow of natural gas.

3. Petitions for Rehearing

Petitions for rehearing of the court's decision were filed by California, the Commission and the Southern Companies. The petitions were denied by order of the court, without opinion, dated December 17, 1963 (App. C., p. 18, *infra*).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is that the Commission overstepped its jurisdictional boundaries and extended its regulatory powers into an area the Congress placed "off limits" to the agency. Contrary to such decision, the jurisdiction of the Commission, under the undisputed facts of this case, is supported by the Natural Gas Act and the decisions construing that Act, and by the precedents of the Commission.

A. The National Importance of This Case.

The interest of California in this proceeding stems from the fact that at least some part of the gas involved in this proceeding actually will flow to household and industrial consumers within the state. (R. 57, 65-66). Moreover, California, as the largest natural gas consuming state in the nation,[7] asserts its interest as a local regulator of natural gas and as a party to proceedings affecting the state before the Federal Power Commission. Yet the question presented by this case is not peculiar to California's interest. The question affects every natural gas consuming state in the nation.

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[7] In 1962 California purchased over 715,000,000,000 cu. ft. of gas from El Paso at a cost of $258,000,000

The decision of the Court of Appeals is in conflict with the intent of Congress, in enacting the Natural Gas Act, to provide a comprehensive scheme of natural gas regulation. As shall be shown, the decision creates an attractive gap in such scheme and permits the subversion of Commission jurisdiction by private bargain. The decision of the court below clashes with this Court's decision in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), which urged a broad interpretation of the Natural Gas Act to assure accomplishment of the congressional program.

The gas involved in this proceeding will be produced in the Gulf Coast area of the State of Texas, and will be sold under contracts at initial prices ranging between 19.5 and 22 cents per Mcf. These prices exceed the Commission's Statement of General Policy No. 61-1 price of 16 cents per Mcf[8], and will exceed any price El Paso currently is paying for natural gas for interstate transportation. Since the costs incurred through the Lo-Vaca and Houston purchases will increase El Paso's cost of service, the inability of the Commission to regulate the sales at the outset can materially injure California gas consumers. Moreover, the efforts of the Commission to stabilize gas prices through the Policy Statement will suffer a serious setback.

This case involves a huge volume of gas. Lo-Vaca will sell 50,000 Mcf per day; Houston will sell an average of 70,000 Mcf per day. If these sales go unregulated, at excessive rates, comprehensive regulation for consumer protection will be more illusory than real.

The problem created by the opinion of the majority of the court below is of considerable magnitude. By refusing to recognize one aspect of Commission authority, the ability of the Com-

8. Statement of General Policy No. 61-1, 18 C.F.R. Sec. 2.56, as amended October 25, 1960, December 20, 1960, April 15, 1961, December 30, 1961, September 7, 1962, March 27, 1963, November 27, 1963, and December 9, 1963.

mission to achieve any type of effective regulation is impeded. A decision, therefore, in this matter by this Court is needed.

B. An "Attractive Gap" Is Created.

This Court has consistently held that the purpose of the Natural Gas Act "is to create a comprehensive and effective regulatory scheme * * * to protect consumer interests against exploitation at the hands of natural gas companies." *Panhandle Eastern Pipe-line Co. v. Public Service Commission*, 332 U.S. 507, 520 (1947). Such comprehensive regulation does not envision "gaps" where neither the federal agency nor any state can be expected to exercise authority in the interest of consumer protection. In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961), this Court stated:

> "Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource."

This case is an "attractive gap" case. Unlike *North Dakota v. Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957), principally relied upon by the court below, the result in this case is nonregulation. In *North Dakota* a finding of no federal jurisdiction resulted in state regulation of the sale. In that case, where the State of North Dakota was demanding the exercise of federal jurisdiction, the court stated: "While the court recognizes the petitioners' [the State and the Public Service Commission of North Dakota] proper concern for the interests of North Dakota natural gas consumers in the newly developing market area, the conclusion is inescapable that the jurisdiction rests not with the FPC but with petitioners themselves." 247 F.2d at 178. In the instant case, by contrast, if federal jurisdiction is denied recognition, regulation to protect natural gas consumers in California is forever foreclosed. California cannot influence what transpires

in Texas, Arizona and New Mexico. The State of Texas—where the gas involved herein is produced—has no conceivable or asserted interest in the price regulation, for the benefit of California consumers, of Lo-Vaca's gas or Houston's gas.

Without federal regulation and without state regulation, the gap in the congressional scheme of regulation is indeed an attractive one. Invariably, interstate pipeline companies, like El Paso, utilize some parts of the interstate streams of gas they transport as fuel for compression units and other facilities along the pipeline. Now, as the result of the decision of the court below, gas so consumed can be contractually labeled "nonjurisdictional" and an unregulated price can be set therefor. The stream of gas which will contain the Lo-Vaca and Houston gas is an accumulation of gas from many sources. Now, by the magic of words lodged in a contract, Lo-Vaca and Houston will get a higher, unregulated price for their gas even though the gas is admittedly lost in the stream.

This is not a case where federal and state authorities have clashed for jurisdiction over a sale—and one authority has prevailed over the other. Such cases are consistent with a comprehensive scheme of regulation which calls for federal jurisdiction over matters of national concern and state jurisdiction over matters of local concern. What is abhorrent in this case is the creation of a "no man's land". And such is the effect of the Court of Appeals' decision.

In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), this Court laid down a "broader principle" to be utilized in interpreting the Natural Gas Act:

> "[I]n a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and, if we find it cannot, then we are impelled to decide that federal authority governs."

In contrast to such "broader principle", the court below narrowly construed the Act. The court said:

> "It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing, or redrawing it." (App. A., p. 9, 323 F.2d at 194).

This case presents no necessity for a revision of the Act by Congress. That Congress intended comprehensive regulation has long been clear. The question for this Court to consider is whether an "attractive gap", such as has been described, is to be tolerated. Such attractive gaps leave the citizens of the state where the gas is consumed unprotected and without a remedy. Certainly, this was not the intention of Congress.

C. Commission Jurisdiction Cannot Be Subverted by Private Contract Alone.

Parties to natural gas contracts have been given, through the decision of the court below, the unique privilege of deciding for themselves whether their gas is to be jurisdictional, if such, is desirable, or nonjurisdictional, if that is the better alternative. The actual flow of their gas in interstate commerce for resale is apparently irrelevant.

California maintains that the language in the Lo Vaca and Houston contracts cannot control or change the actual facts. According to the undisputed facts involved herein, there is no molecular segregation of the Lo-Vaca and Houston gas from the gas admittedly resold in interstate commerce. (R. 262-63). The gas is segregated only in the sense that the parties say it is segregated.

In electric energy cases this Court has stated that "federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental

test." *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515, 529 (1945). There is no apparent reason for distinguishing electric energy from natural gas energy under the above rule. Yet, the court below applied a legal test of "fungibility". (App. A., p. 8, 323 F.2d at 194).

Fungibility is not an essential fact by itself. California produced gas commingled with interstate gas within California for consumption in California, and nowhere else, does not give rise to federal regulation of the California gas. As a *physical* fact such gas never is transported in interstate commerce. On the other hand, the commingling of the Lo-Vaca and Houston gas with interstate gas means that at least some of the Lo-Vaca and Houston gas will *physically* enter interstate commerce for resale. The mixing of gases is not the important element here, but the actual flow is critical.

El Paso bleeds off quantities of gas from its interstate line and conveniently labels them "Houston Gas" or "Lo-Vaca Gas." This is a fiction. It ignores the facts that the gas of other suppliers besides Lo-Vaca and Houston are in the line (R. 60), that the amount tapped from the line is actually the fuel requirement of the facility served and need only be equal, at least, to the amount purchased from Lo-Vaca or Houston. (R. 67-68).

California maintains that insofar as contracts are expressions of agreement, such agreements cannot override the physical facts of interstate transportation and sale for resale.

California asks that this Court consider whether parties can, by mere contractual words, control an unidentifiable portion of gas in an interstate stream otherwise subject to federal regulation. This is a significant question. For this case involves no change in basic operations by El Paso—only an additional supply of gas which by a fiction will replace gas presently consumed in facilities in Arizona, New Mexico and Texas. The choice here is between fantasy and reality.

CONCLUSION

In view of the Court's consistently broad interpretation of the Natural Gas Act based upon the intent of Congress to provide a comprehensive regulatory scheme, and the narrow interpretation made by the court below, California respectfully requests the opportunity to present this question of the Federal Power Commission's jurisdiction to the Court more fully. This is an important question of public law. Its resolution will have far-reaching effect.

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: March 12, 1964.

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(Appendices Follow)

Appendix A

In the United States Court of Appeals for the Fifth Circuit

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,

Petitioners,

versus

Federal Power Commission,

Respondent.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

(September 24, 1963.)

Before Rives and Cameron, Circuit Judges,
and Bootle, District Judge.

Cameron, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the

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1. The section outlining jurisdiction is 15 U.S.C.A. § 717 (b):
"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added]

controversy presented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas. The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system,

in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in metering—out-metering will not be faithfully consumated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717 (b). See, *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, ". . . the principles of constitutional law and statutory construction are not equated with laws of physics, so that the

inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas v. Federal Power Commission*, 1957, 5 Cir., 247 F.2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 3, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. . . .
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two

cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States v. Public Utilities of California*, 1953, 345 U. S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable . . . But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate . . .", pp. 317-318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate

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2. North Dakota v. Federal Power Commission, 1957, 8 Cir., 247 F.2d 173; City of Hastings v. Federal Power Commission, 1954, D.C. Cir., 221 F.2d 31, certiorari denied, 349 U.S. 420.

3. The Navy consumed some of the power and resold another portion.

4. Pennsylvania Water and Power Co. v. Federal Power Commission, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota v. Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The question phrased by the court was: ". . . does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce . . .?" [P. 176] The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States v. Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here,

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5. In both North Dakota and Hastings, the Commissioner disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the Commission to determine whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) . . . is 'identifiable'. United States v. P.U.C. of California, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] . . . Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1 v. Haynes Oil Co.*, 1935, 80 F.2d 468, 469.[7]

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6. Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

7. *See also, Humble Oil and Refining Company v. Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdic-

tional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

ORDER VACATED.

Rives, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are whether the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca . . . at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract,

but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

". . . . Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled

with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed . . . to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part

be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 882, and its companion case, *Shell Oil Co. v. F.P.C.*, 5 Cir. 1957, 247 F.2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout v. South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR v. Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co. v. Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co. v. Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional

seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by Lo-Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*. Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

Appendix B

United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,
Petitioners,

versus

Federal Power Commission,
Respondent.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

Before Rives and Cameron, Circuit Judges,
and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted; the petitioners' request

that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

Rives, Circuit Judge, dissents

September 24, 1963

Issued as Mandate:

Appendix C

In the United States Court of Appeals for the Fifth Circuit

No. 19478

Lo-Vaca Gathering Company, Houston Pipe Line Company
and
El Paso Natural Gas Company,
Petitioners,
versus
Federal Power Commission,
Respondent,
Southern California Gas Company, et al.,
Intervenor-Respondents.

Petition for Review of an Order of the Federal Power Commission (Texas Case).

(December 17, 1963)

ON PETITON FOR REHEARING

Before Rives and Cameron, Circuit Judges, and Bootle, District Judge.

PER CURIAM

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervenor-Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

Judge Rives: Dissent

Judge Bootle: Concur

Appendix D

RELEVANT PARTS OF STATUTES INVOLVED

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833 (1938), 15 U.S.C. §§ 717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities

be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake

the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f (f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already

being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*. That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U. S. C. § 717f (h)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the

Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. § 717o]